82-1359

Office-Supreme Court, U.S.
FILED
FEB 14 1983
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1982

ANTHONY D. CIOTTI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CHARLES F. SCARLATA, Esquire
SCARLATA & DeRISO
502 Manor Building
Pittsburgh, PA 15219
(412) 765-2855
Counsel for Petitioner

Petitioner, Anthony D. Ciotti, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on November 16, 1982.

QUESTION PRESENTED FOR REVIEW

Whether the principles annunciated by this Court in *Franks vs. Delaware*, 438 U. S. 154 (1978) were violated when a DEA agent purposely withheld information from an issuing authority which would have vitiated the existence of probable cause.

ALL PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ANTHONY D. CIOTTI

United States of America, Office of the United States Attorney, for the Western District of Pennsylvania

---

TABLE OF CONTENTS

Page

QUESTION PREPARED FOR REVIEW i

ALL PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT i

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

ARGUMENT

The District Court Erred by Denying Petitioner's Motion to Suppress 5

CONCLUSION 8

APPENDIX A-1

TABLE OF AUTHORITIES

CASES

Page

Franks vs. Delaware, 438 U.S. 154 (1978) ..... i, 6, 8

Ruggendorf vs. United States, 376 U.S. 528 (1964) 6

United States vs. Armocida, 515 F.2d (3rd Cir. 1975) 8

CONSTITUTIONAL PROVISION

Amendment IV 1

STATUTES

28 U.S.C. 1254(1) 1

21 U.S.C. 846 2

21 U.S.C. 841(a)(1) 2

OPINION BELOW

No opinion was rendered by either the Court of Appeals or the United States District Court for the Western District of Pennsylvania.

The Court of Appeals issued a Judgment Order which appears in the Appendix hereto.

JURISDICTION

The Court of Appeals filed its Judgment Order on November 16, 1982 and denied petitioner's application for rehearing by Order dated December 10, 1982. The Court of Appeals stayed the issuance of the formal mandate until February 15, 1983.

This Court's jurisdiction is invoked pursuant to the provisions of 28 U.S.C §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and affects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

STATEMENT OF THE CASE

On May 29, 1981, a grand jury sitting in the Western District of Pennsylvania, returned a multiple count indictment against Petitioner. In pertinent part, the indictment charged the Petitioner in Count I with Conspiracy to Distribute Controlled Substances in violation of 21 U.S.C. 846; in Count II with the Unlawful Distribution of Marihuana in violation of 21 U.S.C. 841(a)(1); in Count III with the Unlawful Distribution of Diazepam a Schedule IV Controlled Substances, in violation of 21 U.S.C. (841)(a)(1); and in Count VIII with the Unlawful Possession with the Intent to Distribute Hydromorphone, a Schedule II Controlled Substance, in violation of 21 U.S.C. (841)(a)(1).

The trial of this matter commenced on September 9, 1981 and on September 17, 1981, the jury returned a verdict of guilty as to the four (4) counts enumerated above.

On October 15, 1981, the District Court sentenced the Petitioner to the custody of the Attorney General for imprisonment for a period of five (5) years as to Count I, five (5) years as to Count II, three (3) years as to Count III, and fifteen (15) years as to Count VIII. The Court further ordered said sentences were to run concurrently so that the total period of incarceration imposed was fifteen (15) years. In addition, the Court imposed certain special parole terms.

The testimony developed during the course of the Suppression Hearing and Trial disclosed that the Petitioner was arrested on April 30, 1981. At or about the time of his arrest, the Government alleged that he had a conversation with an undercover agent, who was wearing a "body wire" thereby enabling the coversation to be monitored and recorded.

In addition to the information garnered by the undercover agent, the arrest was based in part upon information provided by one Harold Veteto. Mr. Veteto testified at trial that actually

his name was not Veteto but Francis Young. Mr. Young testified that he had known the Petitioner since approximately 1976 and at or around that time the Petitioner lived in Erie, Pennsylvania, at the Calabrese Club. At the time of the alleged offense, the Petitioner was residing at a Howard Johnson's, in the Greater Pittsburgh area. Mr. Young indicated that on or about April 16, 1981, he received a quantity of Marihuana and a quantity of white oval pills, believed to be Qualudes, from the Petitioner.

According to Mr. Young, these white oval pills were removed from a box which was kept behind the bar in the Calabrese Club. Mr. Young indicated that he observed the Petitioner return an unused quantity of the white oval pills to this box but did not see the box returned to its site underneath the bar. At no time during his testimony did Mr. Young make any mention of the presence of Marihuana in the Calabrese Club or of Dilaudid in the Calabrese Club. Additionally, he made no mention of having seen any capsules in or around the Calabrese Club. Mr. Young acknowledged that at or about the time of the alleged transfer, although the Calabrese Club was not open to the public, he observed several people in and around the Club.

The Marihuana and Qualudes, which Mr. Young said he received from the Petitioner, formed the basis for the conspiracy allegation contained in Count I of the indictment. The same controlled substances were alleged to have been distributed in Count II and III, except the Government charged that the Qualudes were actually Diazepam.

The Government also introduced testimony concerning a search which had occurred at the Calabrese Club and the seizure of certain controlled substances. This testimony came principally from Special Agent Lawrence Carroll. Mr. Carroll testified that he executed a search warrant at the Calabrese Club and recovered certain items. These items allegedly were a

small quantity of Marihuana and some Dilaudid capsules. The Dilaudid capsules formed the basis for the allegation of Possession with Intent to Distribute found in Count VIII of the indictment.

Mr. Carroll indicated that he recovered these items from an area behind the bar amidst a number of wooden cabinets and shelving. He stated that some of the shelving was constructed of loose boards and he removed the loose boards and recovered the items. He also testified that the area behind the bar was approximately fifty (50) feet in length, that his recovery did not occur from a "box", and that the loose boards from where the recovery occurred were beneath the cash register behind the bar. While he mentioned that he recovered items containing the Petitioner's name from behind the bar, he acknowledged that one of the items was a 1980 Tax Booklet and that there were papers strewn about all over the area adjacent to his recovery. He further related that he observed correspondence and papers apparently belonging to persons other than the Petitioner. Agent Carroll also testified that he found telephone bills and records for persons other than the Petitioner in the same area as the seizure of the Petitioner's telephone bill and that he seized certain other papers from the same area which were not identifiable with the Petitioner. Finally, he indicated that immediately adjacent to the area where he made his recovery, he observed a woman's purse, and that the only occupant of the Calabrese Club, at the time of the search, was a woman.

The affidavit for the search warrant which led to the search by Agent Carroll and the discovery of the Dilaudid, was based principally upon information provided by Mr. Veteto-Young. In the affidavit, the affiant, who was Special Agent Richard Syc, detailed information he supposedly received from Veteto-Young. In summary, the affidavit indicated that Veteto-Young received certain controlled substances from the Petitioner on or about April 17, 1981 and that some of these

substances had been kept in the Calabrese Club. The affidavit contains no information concerning Veteto-Young's personal observations after April 17, 1981, up to and including the date of Petitioner's arrest on April 30, 1981. Additionally, the affidavit sets forth a number of telephone conversations between Veteto-Young and the Petitioner which were monitored by Special Agent Richard Sye. In none of these conversations is there any direct reference to the presence of any drugs at the Calabrese Club.

As previously indicated, shortly before Petitioner's arrest, he had a lengthy conversation with another special agent from the Drug Enforcement Administration who was wearing a "body wire" at the time of the conversation. The testimony at the Suppression Hearing indicated that the affiant, Special Agent Richard Sye, was the monitoring agent who monitored and recorded the conversation between the Petitioner and the undercover operative. During the course of that conversation, the undercover agent repeatedly attempted to not only purchase drugs but find out where the drugs were being kept. His attempt to purchase was fruitless and the Petitioner indicated repeatedly that he did not know if there were any drugs available. During the course of this conversation, the Petitioner also told the undercover agent that he thought that the drugs which were previously available were no longer there and had been returned to the original source of supply.

ARGUMENT

The District Court Erred By Denying Petitioner's Motion To Suppress.

As we pointed out above, the District Court sentenced the Petitioner to the custody of the Attorney General for a period of fifteen (15) years based on the jury verdict as to Count VIII of the indictment. This Count alleged that the Petitioner possessed a quantity of Dilaudid with the intent to distribute. The Dilaudid was recovered, pursuant to the authority of the pre-

viously mentioned search warrant from the Calabrese Club, and the Petitioner filed a timely Motion to Suppress alleging that these controlled substances were unlawfully seized and a Hearing was held on this matter.

Traditionally, Courts have limited attacks on search warrant affidavits to the four corners of the document itself, *Ruggendorf vs. United States,* 376 U. S. 528 (1964). However, this principal has been expanded and in certain instances, a Petitioner has been afforded an opportunity to go beyond the four corners of an affidavit, where, as here, there is a material misrepresentation, *Franks vs. Delaware,* 438 U. S. 154 (1978). The Petitioner respectfully suggests that the warrant in the instant case is demonstrably defective.

When an affidavit contains misinformation which was included as the result of a knowing or intentional falsity or a reckless disregard for the truth, a Petitioner is entitled to relief, *Franks, Supra.* Here the Petitioner suggests that the affiant, Special Agent Richard Sye, consciously elected to withhold relevant information from the issuing authority, because the information would vitiate the existence of probable cause.

A review of the affidavit discloses that the warrant was issued based upon information provided to the affiant by Harold Veteto (Francis Young). The affidavit relates that Veteto received a quantity of Methaqualone tablets from the Petitioner on April 17, 1981, at the Calabrese Club. According to the information in the affidavit, a quantity of Methaqualone tablets remained at the Club.

The affidavit reveals no additional contact between Veteto and the Calabrese Club between April 17th and April 30th, 1981, the date of the issuance of the warrant. Indeed, the only other reference to the Methaqualone tablets concerns a need to acquire any additional ones in Erie, and a supposed acknowledgment that there were still some at the Club.

The affidavit also discloses that the Petitioner was not residing in the Erie area but rather was living in the Greater Pittsburgh area.

Most importantly, however, there is absolutely no mention in the affidavit of the conversation which occurred between the Petitioner and the undercover agent, immediately prior to Petitioner's arrest. The absence of this information is interesting since the warrant and affidavit were prepared and presented to the Magistrate after Petitioner's arrest. Needless to say, the undercover agent attempted to acquire drugs from the Petitioner. As illustrated, in the testimony of the undercover agent, not only was this attempt fruitless but the Petitioner indicated that there were no drugs available at the club. Furthermore, a review of the taped conversation between the undercover agent and the Petitioner clearly discloses that the Petitioner told the agent there were no drugs available at the club. Indeed, the transcript of this conversation discloses an apparent attempt by the Petitioner to procure something for the agent from someone else. Specifically, in the conversation, the Petitioner calls "Crazy Al" and then tells the agent that the product is not available until after six o'clock.

With respect to the alleged drugs contained or secreted at the club, Petitioner indicated to the undercover agent that the people whose drugs they were "were talking about taking them all back". The agent then inquired as to whether or not Petitioner has them "up there still", to which the Petitioner responded "if they didn't take them back, don't forget, this is like two (2) weeks ago". Petitioner also apparently indicated to the agent that he didn't know if they were still there or if they are gone or what. There is also additional conversation indicating that it would be necessary to call to find out whether or not any of the drugs which Veteto had were still available.

To be sure, the exclusion of the information indicating that the drugs were no longer present at the Calabrese Club had a tremendous impact on the Magistrate's determination of probable cause. That is, if this information had been included in the warrant, particularly since the informant's information was two (2) weeks old, it would have vitiated the existence of probable cause. Since the affiant, a Federal Agent, had knowl-

edge of this information prior to executing the affidavit, he had an affirmative obligation to include such information in the affidavit. His failure to do so can only be construed as a conscious and intentional attempt to deceive the issuing authority. We respectfully suggest that this Court should not countenance such conduct on the part of Federal law enforcement officers.

In addition to the need for a prophylactic rule prohibiting conscious deceit by law enforcement officers, the remedy for such conduct is expressly set forth in *Franks, Supra,* and *United States vs. Armocida,* 515 F.2d (3rd Cir. 1975).

When an affirmative misrepresentation has been made, the law requires that such representation be deleted and the affidavit re-evaluated without the benefit of the misrepresentation. Here we have a misrepresentation by ommission. In such a case the remedy is to include the ommitted information and then re-evaluate the affidavit. Clearly, the inclusion of the information concerning the uncertainity of the Petitioner that the drugs were at the Calabrese Club and indeed the likelihood expressed in the conversation that they were not, destroys any probable cause which may have existed.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

CHARLES F. SCARLATA
SCARLATA & DeRISO
502 Manor Building
Pittsburgh, PA 15219
Counsel for Petitioner

February, 1983

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of February, 1983, three (3) true and correct copies of the within Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit was served, by first-class mail, upon the following:

Rex E. Lee, Solicitor General
U. S. Department of Justice
5143 Main Justice Building
Washington, D. C. 20543

Paul Brysh, AUSA
Office of the United States Attorney
U. S. Post Office & Courthouse
7th and Grant Street
Pittsburgh, Pennsylvania 15219

CHARLES F. SCARLATA
Counsel for Petitioner

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 81-2956

UNITED STATES OF AMERICA

vs.

ANTHONY CIOTTI
FNU, LNU a/k/a J.R. (JAMES J. RUSSELL)
FNU, LNU a/k/a Herk (Eugene Cravenor)
FNU, LNU a/k/a Vince (Anthony DiPasquale)

ANTHONY CIOTTI
Appellant,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA—ERIE
(D. C. CRIM. No. 81-00093-01

Submitted Under Third Circuit Rule 12(6)
November 16, 1982
Before: ALDISERT, SLOVITER, and ROSENN, *Circuit Judges.*

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that: (1) the district court erred by denying the defendant's motion to suppress; and (2) the district court erred in denying defendant's motion for judgment of acquittal at the close of the government's case and at the close of all the testimony because, as to Count VIII, the evidence was insufficient as a matter of law; it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ ALDISERT J.
Circuit Judge

Attest:

/s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk
DATED: November 16, 1982